

(4)  
No. 95-891

Supreme Court, U.S.

FILED

FEB 20 1996

CLERK

In The  
**Supreme Court of the United States**  
**October Term, 1995**

STATE OF OHIO,

*Petitioner,*

v.

ROBERT D. ROBINETTE,

*Respondent.*

On Petition For Writ Of Certiorari  
To The Ohio Supreme Court

**REPLY BRIEF**

MATHIAS H. HECK, JR.  
Prosecuting Attorney  
Montgomery County, Ohio

CARLEY J. INGRAM  
Counsel of Record  
Assistant Prosecuting Attorney

ARVIN S. MILLER  
Assistant Prosecuting Attorney

Montgomery County  
Prosecutors' Office  
Appellate Division  
Montgomery County Courts  
Building  
P.O. Box 972  
41 North Perry Street - Suite 315  
Dayton, Ohio 45422  
(513) 225-4117

*Attorneys for Petitioner*

H PW

Respondent makes several assertions in his Brief in Opposition that require a response.

A. Respondent asserts that the Ohio Supreme Court did not abandon the totality of the circumstances test, but merely added the mandated admonition as an additional circumstance to be considered in determining whether consent to search or to answer questions was voluntary when such consent came at the conclusion of a lawful traffic stop. This is plainly wrong. The Ohio Supreme Court's holding in the case below is expressed in the syllabus, according to Ohio law. The second syllabus in this case provides as follows:

The right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

This is unambiguous declaration by the Court that, in Ohio, the failure to give such a warning renders any subsequent consent *ipso facto* involuntary.

The facts of this case also defeat Respondent's argument that the Court intended the mandatory admonition to be but one of many circumstances to be considered. Robinette testified that he knew he was free to leave when the officer gave back his driver's license. The videotape demonstrates that nothing about the encounter would have caused a reasonable person to believe that he

was not free to leave or was not free to refuse to answer the officer's questions. Yet the Ohio Supreme Court has decreed that Robinette's consent will be deemed in involuntary simply because he was not advised that he was free to go. Despite Respondent's attempts to minimize the import of the Court's decision, it is a *per se* rule, and an abdication of the totality of the circumstances test that this Court has endorsed many times over the past 20 years.

B. Respondent also attempts to portray the holding of the Ohio Supreme Court as primarily a matter of Ohio law decided under the Ohio Constitution, and argues that the decision does no more than afford Ohio motorists "greater protection." Nothing could be further from the truth. The Ohio Supreme Court unambiguously held that consent obtained from a motorist at the conclusion of a traffic stop, where the officer had not advised the motorist that he was free to go, violated the federal and state constitutions. This case was decided under the Fourth Amendment to the United States Constitution, and Respondent cannot in good faith claim that it does no more than give added protection to Ohio motorists under the Ohio Constitution.

Furthermore, the Ohio Supreme Court's decision that the practice violated both the federal and state constitutions is an insufficient basis upon which to deny certiorari. *Michigan v. Long* (1983), 463 U.S. 1032, 103 S.Ct. 3469. In *Ohio v. Wyant* (1993), 509 U.S. \_\_\_\_ 113 S.Ct. 2954, this Court granted a writ of certiorari, vacated judgement and remanded the case to the Ohio Supreme Court for further consideration in light of *Wisconsin v. Mitchell* (1993), 509 U.S. \_\_\_\_ 113 S.Ct. 2194. The basis of the Ohio Supreme Court holding in that case was that a particular

statute violated the federal and state constitutions. *State v. Wyant* (1994), 68 Ohio St.3d 162. As noted, this Court allowed the writ in that case where the holding was virtually identical to the language used by the Ohio Supreme Court in this case.

---

### CONCLUSION

The Ohio Supreme Court has announced that admonition that the motorist is free to leave is the *sine qua non* of a voluntary consent when the consent comes at the conclusion of a traffic stop. This bright line test is contrary to a long, unbroken line of cases decided by this Court under the Fourth Amendment. For this reason, Petitioner respectfully requests that the Court grant certiorari in this case.

MATHIAS H. HECK, JR.  
Prosecuting Attorney  
Montgomery County, Ohio

CARLEY J. INGRAM  
Counsel of Record  
Assistant Prosecuting Attorney

ARVIN S. MILLER  
Assistant Prosecuting Attorney

Montgomery County  
Prosecutors' Office  
Appellate Division  
Montgomery County Courts  
Building  
P.O. Box 972  
41 North Perry Street - Suite 315  
Dayton, Ohio 45422  
(513) 225-4117

Attorneys for Petitioner